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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLEY OMAR ROBINSON,

Defendant and Appellant.

B205682

(Los Angeles County
Superior Ct. No. BA307376)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Affirmed.

Donald R. Wager for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Kelley Omar Robinson appeals from the judgment entered following his guilty plea to a charge of possessing marijuana for sale (Health & Saf. Code, § 11359).¹ Robinson challenges the police officers' warrantless entry into his home and the sufficiency of the subsequent search warrant affidavit, which was based in part on the marijuana odor the officers detected during the warrantless entry. We affirm.

FACTS

On the afternoon of July 27, 2006, Los Angeles Police Department Officer Paul Sandate and two other officers were conducting a surveillance for an unrelated narcotics investigation on Marburn Avenue when they saw Derrick Johnson drive up to Robinson's house, park, and knock at the front door. Defendant opened the door and spoke with Johnson for a short time. The two then walked to an SUV parked in the driveway. Defendant retrieved a briefcase from behind the driver's seat, removed two clear plastic bags knotted together, and handed them to Johnson. Based on his training and experience as a narcotics officer, Sandate believed the bags contained marijuana. Sandate and the other officers, all of whom were in plainclothes, walked up to defendant and Johnson. As they approached, Johnson put the bags into his pocket. The officers identified themselves as police, detained the two men, and removed the bags, which appeared to contain marijuana, from Johnson's pocket.

Defendant confirmed he lived in the house and told Sandate another man was inside. Officers entered the house to secure it. A man was present, as defendant reported. In the basement, the officers detected a strong marijuana odor.

Defendant refused to consent to a search of his residence. Sandate sought a search warrant. In his affidavit, the officer recounted his extensive training and personal

¹ Unless otherwise noted, all statutory references are to the Health & Safety Code.

experience with narcotics investigations and arrests. Based on that training and experience, his observation of the drug transaction in the driveway of Robinson's home, and the marijuana odor emanating from the basement, Sandate concluded that defendant's residence was "being used to store and distribute marijuana," and that "narcotics and related evidence" would be recovered from the house. The magistrate issued a search warrant for Robinson's house and SUV and Johnson's van. In the home, officers seized approximately three pounds of marijuana, three handguns, a large amount of cash, a digital scale, baggies, and small quantities of cocaine and ecstasy. Johnson's van contained seven pounds of marijuana.

Defendant moved to quash or traverse the warrant and to suppress all the seized evidence on the ground the warrant was partially based on the officers' observation during the earlier warrantless entry into the house, for which there was neither probable cause nor exigent circumstances. The trial court found both probable cause and exigent circumstances and noted that probable cause existed even without the statement concerning the marijuana odor.

Robinson entered a guilty plea to possession of marijuana for sale. The trial court suspended imposition of sentence and placed defendant on probation.

DISCUSSION

The Transaction

The officers saw Robinson hand Johnson 5.92 grams of marijuana. Defendant maintains this conduct constituted a cite and release, nonjailable misdemeanor to give away not more than 28.5 grams of marijuana. (§ 11360, subd. (b).) This crime, Robinson contends, is akin to simple possession of not more than 28.5 grams of marijuana. And police officers who see individuals inside a home in simple possession of not more than 28.5 grams of marijuana may not enter the home without consent or a search warrant. The crime is so minor that it cannot justify a warrantless entry into

someone's home, based on exigent circumstances, even to prevent the imminent destruction of evidence. (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1034.) Defendant maintains *Hua* is "directly on point" and reiterates the prescient dicta in that decision: "Thus, even had the officers observed one individual in the [home] furnish another with marijuana, the officers did not have probable cause to believe that a jailable offense was being committed at the time they entered." (*Id.* at p. 1037.)

Without probable cause to believe that a jailable offense was being committed when they saw Robinson in his driveway handing Johnson a small quantity of marijuana, defendant concludes the officers had neither probable cause nor exigent circumstances for the warrantless entry into the home.

What defendant's argument misses is that an individual who sells or furnishes or who offers to sell or furnish marijuana, no matter the quantity, is guilty of a felony. (§ 11360, subd. (a).) The sale or furnishing of a controlled substance is not limited to cash transactions. (*People v. Peck* (1996) 52 Cal.App.4th 351, 357; *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.) And a felony *offer to sell or furnish* may not even result in a completed transaction. Therefore, it is of no consequence that the officers did not see Johnson hand defendant any consideration for the marijuana.

Moreover, the possibility that Robinson was giving away the marijuana did not negate the legal significance of what appeared to be a sale of the substance, punishable as a felony without regard to the amount. (§ 11360, subd. (a).) Where "the facts known to an officer are sufficient to constitute probable cause to arrest, the possibility of an innocent explanation does not vitiate probable cause and does not render an arrest unlawful." (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 453.) Probable cause requires sufficient grounds for a strong suspicion, not *prima facie* evidence of guilt. (*People v. Thuss* (2003) 107 Cal.App.4th 221, 236.)

This is what distinguishes the situation in this case from that in *Hua*. The hand-to-hand transfer of a small quantity of "green leafy plant material" here, as witnessed by an experienced narcotics officer, was consistent with a felony sale or furnishing. That

conduct provided probable cause to arrest defendant for a jailable offense. The observed criminal conduct of the individuals in *Hua*, who were sitting in an apartment smoking marijuana, was so minor they could not be jailed for it. It provided probable cause for issuance of a citation, perhaps, but not, without more, probable cause for an arrest.

The Warrantless Entry

Even though the officers witnessed what appeared to be a felony sale or furnishing of marijuana, the warrantless entry into Robinson's home is still presumed to be illegal. The prosecution has the burden to prove an exception to the warrant requirement. (*People v. Williams* (1999) 20 Cal.4th 119, 130.)

A combination of exigent circumstances and probable cause generally establishes an exception and permits officers to conduct a warrantless search or enter a residence to secure it while awaiting issuance of a warrant. (*People v. Bennett* (1998) 17 Cal.4th 373, 384.) The transaction the officers observed between Robinson and Johnson provided probable cause.

Whether exigent circumstances also existed depends on what the officers knew or believed and whether the actions they took in response were reasonable. (*People v. Duncan* (1986) 42 Cal.3d 91, 97.) Where the claim of exigent circumstances is based upon the loss or destruction of evidence, courts have found the following factors relevant: ““(1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge “that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.”” [Citation.]” (*People v. Koch* (1989) 209 Cal.App.3d 770, 782, disapproved on another ground in *People v. Weiss* (1999) 20 Cal.4th. 1073.) The absence or presence of a particular factor is not conclusive. (*People*

v. Ortiz (1995) 32 Cal.App.4th 286, 292-293.) However, when “the emergency is the imminent destruction of evidence, the government agents must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy evidence. The reason may be the arrest of a confederate” (*People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209.) “And in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or ‘hunches,’ but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.” (*People v. Block* (1971) 6 Cal.3d 239, 244.)

Exigent circumstances existed here. The officers arrested Robinson and Johnson during daylight hours approximately 15 feet from the front door of the home. Defendant told the officers he lived in the home and another man was inside. It was reasonable for the officers to believe the man in the home saw what occurred in the driveway. Because Sandate witnessed a drug transaction and believed Robinson was selling marijuana from his home, it was also objectively reasonable to believe the man inside the house knew of those activities and either posed a danger to the officers or was in a position to destroy evidence of drug dealing to protect himself and defendant from criminal liability. (See, e.g., *People v. Thompson* (2006) 38 Cal.4th 811, 818.)

Based on statements in the affidavit, the warrantless search of the home was limited to those places where people could be. Individuals could have been in the basement, and the officers acted reasonably in entering that room. According to the affidavit, they did not search the basement for contraband, but simply entered and smelled an odor of marijuana. The officers’ conduct was reasonable under the circumstances.

The trial court properly found probable cause and exigent circumstances to justify the warrantless entry into Robinson’s home. That same probable cause was sufficient to support issuance of the search warrant, even if the officers had not already entered the

home without a warrant and smelled marijuana. However, because the officers were legally in Robinson's home when they detected the marijuana odor, that information was appropriately included in Sandate's affidavit.²

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

² As we conclude the warrantless entry into defendant's home was lawful, it is not necessary to address defendant's arguments concerning the sufficiency of the search warrant.

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.